SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-617

RESERVE LIFE INSURANCE COMPANY AND MIDLAND NATIONAL LIFE INSURANCE COMPANY,

Petitioners,

vs.

PROVIDENT LIFE INSURANCE COMPANY, R. W. EDICK, ET AL., AS TRUSTEES OF THE PROVIDENT LIFE INSURANCE COMPANY VOTING TRUST DATED NOVEMBER 15, 1955, AND EXTENDED TO NOVEMBER 14, 1980,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BARNABAS F. SEARS
ROBERT J. SUGRUE
J. KIRK WINDLE
Suite 2650
One IBM Plaza
Chicago, Illinois 60611

JOHN A. ZUGER
LEONARD H. BUCKLIN
316 North Fifth Street
Bismarck, North Dakota 58501
Counsel for Respondents

INDEX.

	PAGE
Questions Presented	1
Argument	2
I. The Court of Appeals Did Not Decide an Important State Question in a Way in Conflict with the Applicable State Law	2
II. Petitioners Have No Standing to Sue Under the Securities Act of 1933	4
III. The Extended Voting Trust Certificates Were Exempt from the Registration Provisions of the Securities Act of 1933 Under Section 3(a)(9) Thereof	8
Conclusion	9

CITATIONS.

Cases.

Corporation Trust Co. v. Logan, 52 F. Supp. 999 (D. Del., 1943)	6
Deckert v. Independence Shares Corp., 311 U. S. 282 (1940)	6, 7
Duffy v. Ranger Securities Corp., 346 F. Supp. 1401 (E. D. N. Y., 1972)	6
First National Bank v. Bovey Shute & Johnson, Inc., 191 N. W. 765 (N. D. 1922)	4
Greater Iowa Corp. v. McLendon, 378 F. 2d 383 (C. A. 8, 1967)	5, 6, 7
Kinsey v. Knapp, 154 F. Supp. 263 (E. D. Mich. 1957)	6
Knapp v. Kinsey, 249 F. 2d 797 (C. A. 6, 1957)	6
Marks v. City of Mandan, 296 N. W. 34 (N. D. 1941)	4
Simmons v. Wolfson, 428 F. 2d 455 (C. A. 6, 1970)	6

Walker Process Equipment, Inc. v. FMC Corporation, 356 F. 2d 449 (C. A. 7, 1966) 7

In re White, 69 N. D. 61, 284 N. W. 357 (1939) 3

Constitutional Provision.

Section 16 of Constitution of North Dakota 3

Statutes.

Securities Act of 1933, 48 Stat. 74, 15 U. S. C. § 77a *et seq.*:

Section 3(a)(9) 2, 5, 8, 9

Section 5 ..... 4, 5

Section 12 ..... 5, 6, 7

North Dakota Century Code:

Section 1-02-10 3

Miscellaneous

CCH, Fed. Sec. L. Rep. ¶ 2165.25 8

Loss, Securities Regulation (1961 ed.) 580 ..... 6, 8

Sowards, The Federal Securities Act, 11 Business Organizations § 3.10(4) 9

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BRIEF OF RESPONDENTS IN OPPOSITION

MAY IT PLEASE THE COURT:

Respondents respectfully file this Brief in Opposition to the Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

I.

Whether the Court of Appeals decided a question of State law in conflict with applicable State law (Rule 19).

II.

Whether Petitioners have standing to sue under the Securities Act of 1933.

III.

Whether the extended Voting Trust Certificates were exempt from the registration provisions of the Securities Act of 1933 under Section 3(a)(9) thereof.

ARGUMENT

I.

The Court of Appeals Did Not Decide an Important State Question in a Way in Conflict with the Applicable State Law.

The state law questions here involved are two:

(1) The validity of the voting trust agreement and its extension under the North Dakota voting trust statute, and

(2) The validity of the voting trust and the extension thereof under various state Blue Sky Laws.

1. The Validity of the Voting Trust Agreement and Its Extension Under the North Dakota Voting Trust Statute

Petitioners urge that the extension of the voting trust agreement was invalid under the North Dakota statute regulating voting trust agreements (Pet. pp. 14-15) for five "reasons", summarized in their Petition (pp. 22, 23). They argue this as though the question presented was whether the Court of Appeals decided the state law correctly, when the issue pursuant to Rule 19 is whether that Court decided it contrary to applicable state law. There is no North Dakota law contrary to the

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A refers to Appendices to Respondents' Petition for Certiorari filed in this Court, No. 74-423.

Pet. refers to the Petition of Petitioner.

holding of the District Court, as affirmed by the Court of Appeals.

The Court of Appeals boiled down Petitioners' five "reasons" (Pet. 22, 23) to "two contentions":

> "(a) that the extension of the voting trust violated the ten-year statutory limitation and (b) that because the trustees removed mailing labels from the consents to the extension of the trust agreements, the trustees thereby failed to file a requisite 'counterpart of the voting trust agreement' ".

Of these it said:

> "The District Court rejected both of these contentions and held the extension of the voting trust valid and the filings in compliance with N. D. Cent. Co. § 10-19-35. We find no North Dakota case law pertinent to the issues raised, and appellants have presented no persuasive authority contrary to the determination of the trial court." (A25)

Most of the foreign cases cited by Petitioners (Pet. pp. 16-22) with respect to the validity of the extension of the voting trust were argued to the Court of Appeals and found not "persuasive." On the issue of filing "a requisite counterpart" of the said agreement, the Court of Appeals deferred to the expertise of the District Judge (The Honorable Ronald N. Davies) in interpreting North Dakota law, and followed his interpretation. (A26). While Petitioners are critical of this interpretation (Pet. p. 15), they cite no North Dakota law to the contrary.

The only North Dakota case they cite is *In re White*, 69 N. D. 61, 284 N. W. 357 (1939). No question of statutory retroactive application was involved there, as here. Section 16 of the Constitution of North Dakota provides:

> "No bill of attainder, ex post facto law or law impairing the obligations of contracts shall ever be passed."

Section 1-02-10 of the NDCC provides:

> "No part of this Code is retroactive unless it is expressly declared to be so."

The North Dakota statute with respect to voting trusts is not by its terms retroactive. The North Dakota courts have stated that, even as to statutes to which the legislature may constitutionally give retroactive effect, there is no presumption that such effect was intended.[1]

2. The Validity of the Voting Trust and the Extension Thereof Under Various State Blue Sky Laws

The Court of Appeals discussed this question under IV, entitled, "Standing and Exemption under State Laws." (A30, 31). We see no reason to expand the discussion. Petitioners have cited no North Dakota or other state law in conflict with the Court of Appeals' determination.[2]

II.

Petitioners Have No Standing to Sue Under the Securities Act of 1933

Petitioners' suit challenged the validity of the extension of the terms of the voting trust because the voting trust certificates issued in connection with the extension were not registered under Section 5 of the Securities Act of 1933. (15 USC § 77e, Pet. 23, 24) Petitioners assert that they have standing to maintain this action because at the time they amended their complaint they held extended voting trust certificates and therefore "qualified as purchasers of securities having succeeded to said securities by purchase." (Pet. 30) The Court of Appeals recognized that petitioners faced a serious question of standing but

1. *Marks* v. *City of Mandan*, 296 N. W. 34 (N. D. 1941); *First National Bank* v. *Bovey Shute & Johnson, Inc.*, 191 N. W. 765 (N. D. 1922).

2. The Court of Appeals ignored Petitioners' III (Pet. 24-27) for the obvious reason that the record showed and the District Court found "that the Plaintiffs had failed to prove that the original offering of Voting Trust Certificates in 1955 and 1956 violated the provisions of the Securities or Blue Sky laws of any state." (A16), —entirely apart from the fatal bar of the statute of limitations.

assumed standing to get to the merits of respondents' Section 3(a)(9) claim for exemption [15 USC § 77 c(a)(9)], noting that it had previously held in *Greater Iowa Corp.* v. *McLendon*, 378 F. 2d 383, that the term "purchasers" as used in Section 12 of the Act (15 USC 77*l*), which created a right in private litigants, "was limited only to those purchasers of such voting trust certificates who were in privity with the issuer." (A27)

Section 12 of the 1933 Act provides that:

> "Any person who—
>
> (1) offers or sells a security in violation of Section 5 of this title . . . shall be liable *to the person purchasing such security from him*, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." (Italics ours.)

This language clearly requires that there be privity between the seller and the buyer.

In *Greater Iowa* the plaintiffs alleged that defendants violated Section 5 of the 1933 Act by failing to register the voting trust certificates which they were offering in exchange for common stock of Greater Iowa Corporation. Defendants claimed that the plaintiffs had no standing under Section 12 to allege violations of Section 5. The Court stated (378 F. 2d at 789):

> "None of the plaintiffs has purchased any of the Iowa Trust certificates *from the defendants*. Since 15 U. S. C. § 77*l* only provides relief to 'purchasers' it is clear that this section cannot provide plaintiffs with a basis upon which to seek recovery". (Italics ours.)

The Court further stated (*id.* at 790):

> "The intent of Congress is clear. Section 12 provides a private civil remedy to 'purchasers.' We think this is the civil remedy given to private parties by the framers of the Act, and excludes establishment of additional private civil remedies. Had Congress desired to extend the private

> civil remedy it could have done so by the addition of only a few words. Its failure to do so, and its express limitation to 'purchasers' is a positive indication that Congress desired these provisions privately enforced by purchasers only. It is our conclusion that private civil liability for violations of § 5(a) and § 17(a) exist only when the provisions of § 12 (15 U. S. C. § 77*l*) are met. Therefore, plaintiffs have no jurisdictional standing to invoke the provisions of § 5(a) and § 17(a) of the 1933 Act."

Greater Iowa was followed in *Simmons* v. *Wolfson*, 428 F. 2d 455, 456 (C. A. 6, 1970) and *Duffy* v. *Ranger Securities Corp.*, 346 F. Supp. 1401, 1405 (E. D. N. Y. 1972). While there may be certain exceptions where controlling persons, agents and aiders and abettors are involved, it is clear that Section 12 contemplates an action only by a buyer against his immediate sellers. Loss, *Securities Regulation* (1961), p. 3840. Nothing in this record suggests that respondents participated in the subsequent sale of the certificates to petitioners.

Petitioners' argument on standing is found in two places. In the Argument proper (Pet. 30, 31), they rely solely on *Corporation Trust Co.* v. *Logan*, 52 F. Supp. 999 (D. Del., 1943). In their Reasons for Granting the Writ (Pet. 14), in addition to *Logan* they quote from *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282 (1940), and suggest that the Court of Appeals here "recognized the existence of an important problem as to the rights of private litigants under the 1933 Act and pointed out differences in decisions in *Corporation Trust Co.* v. *Logan*, *supra*, including *Kinsey* v. *Knapp*, 154 F. Supp. 263 . . ." This reference is to footnote 7 of the Court of Appeals opinion. (A27)

In *Logan*, the plaintiffs were purchasers from the issuer and clearly had standing to sue under Section 12. In *Knapp* v. *Kinsey* 249 F. 2d 797 (1957) the Sixth Circuit reversed the judgment of the District Court in *Kinsey* v. *Knapp* that a voting trust was voidable because of failure to register the certificates under the Securities Act of 1933. It stated at page 803 that the

District Court had not answered the question "Is the relief granted by the District Judge available to a purchaser of the security from the original owner . . ." Observing that defendants contended the cause of action given to a certificate holder by Section 12(1) was not assignable to a subsequent purchaser, the Court stated at page 804 that "The section of the Act referred to is subject to the construction that the cause of action is limited to the original owner, with a right to rescission if he still owns the security and a claim for damages if he is no longer the owner. This provision of the Act has not been construed by the District Judge." This issue having been sent back to the District Court for further proceedings, there is no conflict between this decision and that of the Eighth Circuit in *Greater Iowa.*

In *Deckert,* the issue of standing to sue under Section 12 of the Securities Act of 1933 because of lack of privity was not involved. There was privity between buyer and seller and the Court stated that "Undoubtedly any suit to establish the civil liability imposed by the Act must ultimately seek recovery of the consideration paid less income received or damages if the claimant no longer owns the security." (311 U. S. at 288) All *Deckert* holds is that the action may be one in equity as well as in law and that the claimant was entitled to seek injunctive relief or the appointment of a receiver to protect assets of the defendant pending the granting of relief under Section 12.

Labeling their suit as a "declaratory judgment action" (Pet. 4, 13, 27, 30) is no aid to petitioners. "The Declaratory Judgment Act created no new rights, but rather created a new remedy with which to adjudicate existing rights" (*Walker Process Equipment, Inc.* v. *FMC Corporation,* 356 F. 2d 449, 451 (C. A. 7, 1966)). The sole right created here is that prescribed by Section 12, namely, the right of a purchaser to sue, and not the right of a purchaser from a purchaser to sue, as petitioners contend. (Pet. 30)

III.

The Extended Voting Trust Certificates Were Exempt from the Registration Provisions of the Securities Act of 1933 Under Section 3(a)(9) Thereof.

The Court of Appeals, with one exception, noted hereafter, discussed this subject fully in III of its Opinion (A26-30). It quoted Section 3(a)(9) (A26) and it referred to the position of the SEC and Petitioners (A27, 28), which is the identical argument petitioners advance here. (Pet. 10, 11; 23, 24.) It rejected that argument, stating controlling reasons for such rejection (A28-30). We perceive no necessity to reargue the question here as we did in the Court of Appeals, but are content to stand upon the Circuit Court's opinion. Petitioners cite no authority to the contrary. All they suggest is that the SEC disagrees with the Eighth Circuit, scarcely a ground for certiorari.

The exception noted is petitioners' protest that they should have been permitted to introduce evidence with respect to which they made an offer of proof. (Pet. 9, 10.) This is a claim that respondents had no Section 3(a)(9) exemption because Provident Life paid all of the expenses in connection with the extension of the voting trust, including attorneys' fees. The Court of Appeals duly noted that the trial court found that "no commission or other remuneration has been paid or given, directly or indirectly, for soliciting such exchange" (A29, 30), a condition of the Section 3(a)(9) exemption. Again, petitioners cite no authority supporting the relevance of the evidence they offered to prove.

Obviously, the trustees did not receive a "commission" or "remuneration", nor did they pay one. The argument, if cognizable in this frame of reference, is devoid of merit. See CCH Fed. Sec. L. Rep., ¶ 2165.25 (a letter from the Chief of the Securities Division of the Federal Trade Commission, originally in charge of enforcing the 1933 Act), Loss, *Securities Regulation* (1961

ed.) (p. 580) and Sowards, *The Federal Securities Act*, 11 Business Organizations § 3.10(4) at 3-26 n. 67, all of which state that payments of attorneys' fees, printing costs, postage and telephone bills and other similar expenses, are clearly payments which cover the expenses incidental to the exchange and do not destroy the Section 3(a)(9) exemption.

CONCLUSION

It is submitted that the petition does not come within any of the considerations enunciated in Rule 19 and that, therefore, the petition should be denied.

Respectfully submitted,

BARNABAS F. SEARS
ROBERT J. SUGRUE
J. KIRK WINDLE
Suite 2650
One IBM Plaza
Chicago, Illinois 60611

JOHN A. ZUGER
LEONARD H. BUCKLIN
316 North Fifth Street
Bismarck, North Dakota 58501
Counsel for Respondents